

Dairy Nutrient Management Task Force

September 20, 2000

Minutes

Minutes approved at the December 20, 2000 meeting of the Dairy Nutrient Management Task Force held in North Bend, Washington

Executive summary

Most previous action items were accomplished. Still underway is obtaining a representative from the commercial shellfish industry and Washington State University/Cooperative Extension Service. The Commission was to assemble a work group to ascertain how to evaluate older structures but the NRCS stepped forward and formed a committee.

Excellent comments came from the participants in the August tour of the Henry Oord dairy.

Ecology provided a summary of penalties assessed to date. The policy on collecting past due penalties was reviewed.

Ecology summarized enforcement actions by region and statewide. Ecology will provide the number of dairies and number of animals by region.

Discussion about compliance tools available to Ecology resulted in an invitation to an Ecology stakeholder group that reviews this very issue.

Ecology provided examples of minimum, moderate and significant potential to pollute.

The Task Force discussed at some length the events leading to two meetings of dairy producers in Enumclaw. The issues were: (1) placement of a lagoon near a neighbor's residence; (2) an accelerated deadline specified in Notices of Correction; (3) clarification of what constituted a discharge; (4) fairness, or lack thereof, in dairy inspections; and (5) clarification of what constituted good cause to seek an extension of the deadline. Ecology said they would improve the wording used in the NOC letter.

A hold harmless agreement surfaced at the Enumclaw meeting. The purpose of it was unclear. The Commission will investigate.

A licensed profession engineer (Ryan Bartelheimer) discussed how much engineering might be required for all dairies to comply with the deadlines for approved and certified plans. Bartelheimer was invited to return. The Commission will survey the conservation districts to determine their needs.

Phosphorus and how it will be used by the NRCS was discussed. NRCS will assess phosphorus in some way by May 2001 when determining limiting nutrients when developing farm plans. A new tool called the Phosphorus Index is currently being field tested. NRCS will look into the possibility of comparing nitrogen-limited and phosphorus-limited plans to determine the impact on farmers.

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Welcome and attendees

[NOTE: Future action items are numbered and underlined in the minutes.]

The Dairy Nutrient Management Task Force ("Task Force") met in the Cherberg Building, Capitol Campus, Olympia, on September 20, 2000. Senator Marilyn Rasmussen welcomed attendees at 10:15 a.m. and invited all attendees to introduce themselves. It was noted that a quorum of voting members was not present but was expected around lunchtime. Senator Rasmussen pointed out the meeting was informational until a quorum was present.

Task Force voting members and voting alternates attending were:

- Josh Baldi (Washington Environmental Council)
- Representative Bruce Chandler (Legislature)
- Representative Kelli Linville (Legislature)
- Senator Bob Morton (Legislature)
- Senator Marilyn Rasmussen (Legislature)
- Tom Salzer (Conservation Commission)
- Ron Shavlik (USDA Natural Resources Conservation Service)
- Tony Veiga (dairy industry representative)
- Dick Wallace (Ecology)

Other attendees were:

- Ryan Bartleheimer (Snohomish Conservation District)
- Debbie Becker (Wash. State Dairy Federation)
- Chris Cheney (Wash. State Dairy Federation)
- Dave Garland (Ecology staff)
- Dave Johnson (Legislative staff)
- Phil KauzLoric (Ecology – alternate)
- Ken Koch (Ecology staff)
- Bob Lee (Legislative staff)

Minutes

Representative Linville moved and Shavlik seconded to approve the minutes of the August 22, 2000 meeting. Salzer pointed out two corrections to the draft minutes brought to his attention by Koch; these were accepted as friendly amendments by Linville and Shavlik. The motion carried. [Note: A quorum was present at 11:10 a.m.; this motion was passed at about 12:30 p.m.]

Action items – old

Progress on 10 action items from the August 22 meeting was reported:

1. **COMPLETED: Public health department representative** – We have a representative who was unable to attend today's meeting.

2. **UNDERWAY: Commercial shellfish growers representative** – Contact has been made with the Pacific Coast Shellfish Growers Association. They will determine whether or not they can provide a representative.
3. **NO ACTION: WSU/CES representative** – No action on obtaining a WSU/CES representative. Staff will make contact with Dean Mike Tate (action item 1).
4. **COMPLETED: Ecology to report on penalties and collections** – This will be addressed by Ecology today.
5. **COMPLETED: Ecology to provide a breakdown of penalties and actions** – This will be addressed by Ecology today.
6. **COMPLETED: Ecology to provide examples of dairy inspection reports** – This will be addressed by Ecology today.
7. **COMPLETED: Ecology to provide examples of the three “potential to pollute” categories** – This will be addressed by Ecology today.
8. **UNDERWAY: Conservation Commission to assemble a work group to develop a process for evaluating older structures** – NRCS stepped forward and formed a committee to develop procedures. The Conservation Commission is a participant.
9. **COMPLETED: Task Force to send a thank you to Henry Oord** – Several people sent thank you letters to Mr. Oord.
10. **COMPLETED: King Conservation District to be sent meeting minutes** – done. Staff later clarified with King CD that they would like to receive future meeting minutes.

Dairy tour

Senator Rasmussen asked for feedback about the tour of the Henry Oord Dairy. Comments included:

- *A topflight operation with good attention to detail.*
- *Used their manure well.*
- *State of the art operation, modern, well organized.*
- *A model dairy. Henry is a real good dairyman.*
- *Represents a very significant investment. Was well integrated and well located. As a newer dairy, they did not have to retrofit like some older dairies.*
- *Impressed that Henry is constantly working to improve his operation.*

This led into a brief discussion about the location of dairies, and the relocation of dairies. Availability of water can be a problem for new or relocating dairies. There may be an opportunity here for Ecology and NRCS to be proactive. They could identify counties most conducive for dairy operations. For example, Oregon has actively recruited dairies. Ecology could work with NRCS to identify key features of importance to dairy producers.

Water is not the only constraint. Feed is one-half of a dairy operators budget. Feed availability is the number one key. Milk handling is secondary.

NRCS already has most soils digitized.

Status of penalties

Senator Morton asked Ecology to provide a running accounting of totals at future meetings (action item 2).

Wallace: Since October 1, 1998, Ecology has assessed \$445,795 in penalties related to the Dairy Nutrient Management Act. Settlement proceedings (both formal and informal) have validated about \$349,000. From July 1, 2000 to August 31, 2000, an additional \$7,750 was collected. The total in the Dairy Account is now \$64,376. In the same time period, Ecology assessed an additional \$10,000 in penalties. Currently, there is a total of \$184,000 in front of the Pollution Control Hearings Board or awaiting the outcome of PCHB decision. These penalties have not gone to collection.

When asked about policy on collecting past due penalties, Wallace explained that penalty recipients are given an opportunity to request relief. Then they have 30 days to pay, and after 60 days, the account goes to collection. If the penalty remains unpaid, it can go to collection with another collection agency. Each collection agency may spend up to six months on the account.

Enforcement actions

Wallace distributed a handout (HO-1) summarizing Ecology enforcement actions:

Enforcement actions recorded through 9/14/00						
	CRO	ERO	BFO	NWRO	SWRO	Total
NOC	5	17	69	33	30	154
AO	3	2	0	6	23	34
NOV	4	0	9	10	0	23
Penalty	5	1	10	4	13	33
Amount	11,300	2,000	266,600	12,300	161,600	453,800
Permits	7	4	0	12	22	45

NOTES: AO totals do not include AOs issued as Companion Orders to NPDES Permits; Penalty dollar amounts are for the amount of the original penalty without consideration for reductions. Penalties include those issued by HQ for failure to register. Penalty issued by ERO on 3/2/98 and resolved after 10/1/98 also included.

CRO = Central Regional Office, located in Yakima.

ERO = Eastern Regional Office, located in Spokane.

BFO = Bellingham Field Office

NWRO = Northwest Regional Office, located in Bellevue, serves Skagit, Snohomish and King counties.

SWRO = Southwest Regional Office, located in the Ecology headquarters building in Lacey.

A few larger penalties issued from BFO and SWRO inflated the total amount. Senator Morton asked Ecology to provide the number of dairies by region; Baldi asked for number of animals.

Koch responded that Ecology could provide these numbers (action item 3).

Senator Morton identified a need for Ecology to track re-offenders. Wallace suggested Ecology might also track repeat penalties.

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Senator Rasmussen: Can Ecology turn a penalty into a lien on property? KauzLoric said some assets can be attached by a district court, not directly by Ecology. Lee noted that the ag lien laws relate to creditors or suppliers, not really intended to cover penalties by a government agency. Representative Chandler said a lien on property that is then sold punishes the buyer.

Senator Rasmussen identified a district going out of business with a penalty on the books as an issue. Becker noted this issue occurs with other businesses as well.

Representative Chandler: Do penalty amounts relate to the value of damage done or the cost of rectification? Wallace briefly explained the matrix used by Ecology to establish penalty amounts. This matrix includes environmental impact as a factor, and also whether the individual or company received an economic benefit by polluting. Representative Chandler stated penalties should be used to encourage compliance and not be used just as a punitive measure. Wallace noted Ecology only levies penalties for actual discharges.

Representative Chandler: Can some of these discharges be mitigated? Wallace said mitigation can sometimes be included in an order, but once pollution enters a creek and moves downstream, mitigation becomes much more difficult.

Representative Chandler: Are penalties levied for potential to pollute? No, said Wallace. Representative Chandler asked if once a penalty had been assessed, does it mean there has been a discharge. Yes.

Baldi: If a water quality problem resulted from a discharge, is a penalty always levied? Not always, said Wallace. If an administrative order will mitigate the discharge, Ecology can use that mechanism.

Representative Chandler suggested the degree of harm should be used as the basis for setting penalty amounts. Wallace noted that in the case of fish kills and oil spills, Ecology does a quantifiable Resource Damage Assessment to determine the actual harm. Garland noted that "damage" may not be the best word to use in the Resource Damage Assessment.

Wallace said Ecology has a broader stakeholder group dealing with the question of enforcement/compliance tools and suggested inviting them to the next Task Force meeting.

[At this point, the ninth voting member arrived, making a quorum. Senator Rasmussen called the meeting to order.]

Inspection reports

KauzLoric distributed two handouts (HO-2 and HO-3) showing an example of a dairy inspection report and photographs for a dairy that "looked good."

Baldi: How many animals on this dairy? Senator Rasmussen said they had 40 or 50 cows and they use dairy nutrients on their pastures.

Representative Linville: If they have already have a plan, why is a plan recommended? Compliance should be performance based. If there is no water quality problem, maybe we

should not require more onerous actions. Wallace responded that inspection results can depend on the time of year.

Senator Rasmussen: Are there situations that don't require lagoons? Shavlik said yes, where there are relatively few animals and soils are well-drained. In those conditions, producers are able to utilize nutrients without polluting.

Representative Linville: the law is performance based. As long as manure doesn't go into water, the producer is OK. Is there conflict between the flexibility we wanted in the law and NRCS storage requirements? Shavlik responded that NRCS has no six-month storage requirement. The need for storage is a site specific issue based in part on the the number of animals, acres available, soils, and crops. Cheney asked if NRCS has the flexibility to allow other ways of managing nutrients. Yes, said Shavlik.

KauzLoric distributed two additional handouts (HO-4 and HO-5) showing an example of a dairy with some water quality problems. Some questions were raised about the source of water shown in several photographs, i.e., was it ponding rainwater or did the creek flood? Many buildings have no gutters/downspouts. The picture showing the creek well within its banks suggests the water on the farm was coming from rainwater ponding on the poorly-drained soils.

How to correct this kind of situation was discussed. Senator Rasmussen suggested a cease-and-desist order would have been a useful tool, but Ecology does not have this authority. Veiga asked if Ecology can require a producer to go before a judge. KauzLoric said Ecology penalties are civil, not criminal. Ecology can, however, refer a site to the EPA for criminal prosecution under the federal Clean Water Act.

Cheney raised the issue of equal treatment, citing as an example the site described in the handouts where the producer was apparently able to discharge without penalty for a decade. In contrast, producers are receiving NOCs for injecting nutrients because it isn't in the farm plan, or for spreading solids on a field not described in the farm plan.

Representative Linville: What tools are, or are not, available to Ecology, and are they being used? Baldi echoed these questions and noted there seems to be a problem with Ecology's willingness to wear the black hat. Ecology needs to crack down on serious repeat offenders.

Wallace noted that Ecology has a broad-based stakeholder group dealing with the question of tools and suggested the [Task Force to invite them to the next meeting \(action item 4\)](#).

Representative Linville: Farms are moving. Is there any way to ensure we're not passing a problem from one area to another? Representative Chandler added that counties have growth plans and provide permitting/review steps. Wallace noted that the SEPA process in at least one county requires a farm plan.

Potential to pollute

KauzLoric distributed a handout (HO-6) showing a dairy inspection form as completed in the field by the inspector. The third page of the handout provides space for the inspector to check off if he or she observed a discharge, evidence of a discharge, or a potential for discharge of

pollutants to waters of the state. This inspection form was provided as an example of a minimal potential to pollute.

The potential to pollute can be considered minimal, moderate or significant. Minimal potential to pollute means there is less than a 50-percent chance there will be a discharge. Moderate potential to pollute means 51 to an 89-percent chance of a discharge. If there is a 90-percent chance or greater, the potential is described as significant.

KauzLoric distributed a Notice of Correction (HO-7) as an example of moderate potential to pollute. Becker noted the language in the NOC suggested Ecology could penalize the producer up to \$10,000 per day. KauzLoric said this issue came up at the Enumclaw meeting sponsored by Senators Rasmussen and Roach.

If the producer does not follow the NOC and there is no discharge, there is no penalty. A penalty only results if there is an actual discharge.

Representative Linville suggested changing the letter to read "...a discharge will result in a violation..."

Becker: What is "good cause" as used in the NOC? KauzLoric said an example would be timelines imposed by permitting authorities. Representative Linville suggested things outside the control of the producer would constitute good cause.

[At this point in the meeting, the minutes were amended and approved.]

KauzLoric distributed an Administrative Order (HO-8) as an example.

Becker: What enforcement is likely to happen if the producer fails to comply with an Administrative Order? KauzLoric answered that Ecology can issue penalties. Non-compliance with an AO can result in a civil penalty even without a discharge. If the producer holds a dairy general permit, non-compliance with the requirements of the permit can result in a penalty.

Baldi noted that the language in the AO does not sound as threatening as in the NOC.

Some discussion occurred about the matrix used by Ecology for setting penalty levels.

Lee said some things in the three potential-to-pollute examples don't quite connect. We need to look at the applicable statutes for corresponding language. Johnson added that Ecology definitions may not correspond well with legislative language; this needs to be reconciled. Wallace said Ecology was open to reviewing formats and language.

Enumclaw meeting

Shavlik described the events that culminated in Senator Roach calling a meeting with producers in Enumclaw. The situation began with neighbors concerned about the placement of a lagoon in an urbanizing area. The other issue that surfaced at the first meeting was the October 1, 2000 implementation date stated in the NOC received by the producer. This may have contributed, causing the producer to proceed too rapidly with installing a lagoon.

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Shavlik said the soil tests for the site showed two locations would be best suited for a lagoon. One was adjacent to a stream, and obtaining shoreline permits could not be accomplished without violating the deadline in the NOC. The other site near a neighboring residence was selected.

In King County, agricultural activities are exempt from their fill-and-grade ordinance. Without a shoreline permit required, and with the fill-and-grade exemption, there was really no public notice of this activity.

Cheney asked how producers were spreading manure before the lagoon was installed. Shavlik said the dairy was relatively small and used a honey wagon; no water quality violations had been found. Representative Linville: If they were not polluting, why require a lagoon?

Baldi: Were view and odor the only concerns? Becker said no, there were also health concerns voiced.

Senator Roach organized a second meeting for September 13 in Enumclaw. KauzLoric noted that prior to the September 13 meeting, Ecology agreed to extend the deadlines on four other NOCs. He added that Ecology will work to review/revise their procedures when issuing NOCs. It is unclear whether the lagoon would have been sited elsewhere if the NOC deadline for this particular dairy had been extended.

Some discussion occurred over a story in the South County Journal, and one rumored to be going to press in the Capitol Press.

Cheney: Why do some people have to have dairy nutrient management plans sooner than others? Representative Linville said three times today that this law was supposed to be performance based. Senator Rasmussen responded that accelerated timelines were necessary for situations involving imminent pollution. If a dairy producer receives a Notice of Correction, he or she better get on the ball. Cheney stated it was not fair treatment if neighbors are not inspected simply because they don't milk their animals.

During discussion, two different perspectives surfaced. One was the law intended each producer to be in compliance with the requirement to have and implement a DNMP by December 31, 2003. The other perspective was that producers had until December 31, 2003 to be in compliance.

Wallace: We need to refine our explanation of the 2003 date because of the different perceptions of how to view the deadline. It was never intended that everyone would wait until the end of 2003 to comply. Representative Linville asked doesn't responsibility lie with the individual? NOCs help us give producers a "heads up" they may have a problem. Lee noted that the farmers left the Enumclaw meeting with the impression that non-compliance with the NOC would result in a fine. Baldi noted the NOC identifies a producer may be at higher risk of discharging.

Garland noted that a discharge to groundwater was also a concern. However, whatever moves a producer toward agronomic utilization of nutrients moves him or her away from groundwater pollution potential. Discharges to groundwater are not always obvious.

Senator Rasmussen asked if Ecology had received the letter she and Senator Roach sent. Lee explained the letter was sent at Senator Roach's request asking Ecology to clarify the deadlines

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for the extended NOCs. There was confusion because what was reported in the South County Journal was different than what was said at the September 13 meeting. The letter also asks for confirmation that fines would only be imposed for actual discharges, and that pumping into water ponded on fields was not considered polluting the waters of the state.

Lee said some producers were perplexed why they had to have a lagoon. They had been applying in the winter to high ground. KauzLoric noted that the dairy inspector felt that year-round application of dairy wastes presented a substantial potential to pollute.

Senator Rasmussen summed up the issues from the Enumclaw meeting:

1. Ecology issued NOCs containing October 1, 2000 deadlines.
2. John Glynn (Ecology, Northwest Regional Office) said if you discharge, you are penalized. No discharge means no penalty.
3. Ecology said they would clarify their process.

Representative Linville added that today we also talked about good cause – is it defined by something in or out of a producer's control? KauzLoric said good intentions and outside factors are sufficient reasons for Ecology to grant additional time.

Cheney noted that clarification was needed. He said extensions were granted after the first public meeting. KauzLoric said four NOCs were extended after Ecology met with the King Conservation District, and this occurred before the two Enumclaw meetings. To clarify, Senator Morton restated that four dairies had applied for extensions but Ecology had refused. Wallace confirmed this and added that Ecology then met with the conservation district.

Garland and Wallace said Ecology would soften and clarify the wording in the NOC letter (action item 5).

Hold harmless agreement

Senator Rasmussen described the hold harmless agreement that circulated at the September 13 meeting, causing great concern among the producers. Shavlik said the form was intended to protect the conservation district if manure being transported off the farm was spilled. Senator Rasmussen noted that the form frightened the producers and asked if NRCS stood behind their work, to which Shavlik responded yes.

Salzer said he would follow-up on this with the King Conservation District (action item 6).

Engineering needed

Ryan Bartelheimer, P.E. for Snohomish Conservation District, distributed a handout containing his estimate of engineering needs. Engineering experience in Snohomish Conservation District for 18 dairy nutrient management plans was used as the basis for the estimates. These estimates were then extrapolated statewide based on the number of dairies without approved

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plans. Essentially, each practice was assigned an average number of engineering days, then this figure was multiplied by the number of practices statewide.

Bartelheimer estimates 34 full-time equivalent engineers are needed for all dairies to have fully implemented plans. Currently, dairy producers have access to four or five NRCS engineers, nine P.E.s employed by conservation districts, and about 17 dairy nutrient planners.

Following some discussion, Senator Morton asked Bartelheimer to return at the next meeting (action item 7) in Mount Vernon. Representative Linville said we need a better idea of what is needed to get all plans done. Senator Morton asked the Conservation Commission to survey the conservation districts and bring that information to the Task Force (action item 8).

Phosphorus

Shavlik said recent research has shown phosphorus does move through the soil profile, contrary to what we have believed for years. By May 1, 2001, the NRCS will use the Phosphorus Index or a similar tool to judge if phosphorus is a limiting nutrient on a particular site.

The NRCS does not intend to apply this retroactively; it is only for new plans, or for plans needing a major revision. What constitutes a major revision? Examples include increasing the herd size, a change in the land base, changes in application methods, and changing the application schedule.

It should be up to the producer to request a plan revision, although the Ecology registration process could trigger a change in the DNMP. Wallace noted the frequency of updating plans should be reviewed. Representative Linville said plans should be grandfathered if there are no changes. Shavlik said another trigger would be the requirement to take soil samples.

Shavlik noted that NRCS is field testing the Phosphorus Index now. They will need to implement a training process for NRCS and CD staff.

Cheney suggested the issue be tabled. Suddenly, we are hearing phosphorus moves when we never heard that before. Shavlik noted that Oregon and Washington are co-developing the Phosphorus Index, to which Cheney responded that Washington producers have no option because they have a law saying they must have a plan.

Shavlik described the application of the Phosphorus Index as being tied to sensitive areas. It will apply to all activities, not just dairies. Where nutrient application has been ongoing for some time, there could be a significant buildup of phosphorus.

Representative Linville asked if this is a federal standard, why is it only being applied in Washington? Shavlik said we (the NRCS) decided that in Washington and Oregon, the Phosphorus Index was the least onerous mechanism to assess risk. Cheney noted this change elevates phosphorus to become a controlling factor on some farms. He proposed developing a comparison of nitrogen-limited and phosphorus-limited plans for a typical dairy operation, adding that we may have to have legislation that sets standards for the State of Washington.

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Becker asked if dairies under NPDES permit or feedlots must meet NRCS standards. KauzLoric said that compared to beef cattle operations, the general permit for dairies is less stringent. However, they still must do soil testing and balance nutrients.

Senator Morton said if we table this, can we get some experts to review the issue and present it to the Task Force? Cheney said we should get comparisons for the northwest, southwest, Columbia Basin and Yakima regions. Shavlik said he would look into this (action item 9).

Next meeting and adjournment

The next meeting will be held in Mount Vernon from 10:00 a.m. to 3:00 p.m. Staff is to find a suitable location. The consensus of the group was to forego a dairy tour in October.

The meeting was adjourned at 3:30 p.m.

Summary of action items

1. Staff to seek WSU/CES representative from Dean Mike Tate.
 2. Ecology to provide a running accounting of total penalties at future meetings.
 3. Ecology to provide number of dairies and number of dairy cows by region.
 4. Task Force to invite Ecology stakeholder group to next meeting.
 5. Ecology to improve the wording in the NOC letter.
 6. Commission to get clarification of hold harmless agreement from the King CD.
 7. Bartelheimer invited to continue engineering discussion at next meeting.
 8. Commission to survey districts for needs and bring to the Task Force.
 9. NRCS to compare nitrogen-limited and phosphorus-limited plans.
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Summary of motions

1. M/S by Linville/Shavlik to approve the minutes of the August 22 meeting. Corrections accepted as a friendly amendment. Motion carried.

Respectfully submitted,

Tom Salzer